ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

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May 5, 2000

BY FACSIMILE

The Honorable Carol Browner
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

Dear Administrator Browner:

This letter is a follow up to my February 28, 2000 letter about the Environmental Protection Agency's (EPA's) recent enforcement action against certain electric utilities and the Tennessee Valley Authority (TVA), and EPA's responses dated March 31st and April 14th.

I remain concerned that EPA appears to be abandoning its historical and common-sense interpretation of routine maintenance, repair, and replacement in its recent Clean Air Act (CAA) lawsuits against 32 coal-fired power plants in the Midwest and Southern States and its Administrative Compliance Order against seven TVA facilities. EPA's retroactive change in its rules is unfair and may force utilities to delay or forgo important maintenance projects, risking worker safety and electricity reliability at these units, to the detriment of the public.

Under the New Source Review (NSR) program, EPA reviews the construction plans for environmental controls of new power plants and power plants undergoing a "major modification." EPA's NSR regulations define a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the [Clean Air] Act" (40 C.F.R. § 52.21(b)(2)(i)). "Routine maintenance, repair, and replacement" are specifically excluded from the definition of "major modification" (40 C.F.R. § 52.21(b)(2)(iii)(a)). Thus, routine maintenance, repair, and replacement activity does not trigger NSR requirements to retrofit a power plant with state-of-the-art pollution control technology (40 C.F.R. § 51 *et seq.*).

Despite this exclusion, EPA now appears to believe that any activity that restores deteriorating plant capacity or reduces forced outages may trigger NSR requirements. For example, EPA states in its April 14th letter that its analysis supporting its lawsuits compares "the actual emissions before the modification to the projected increase in epresentative [*sic*] future actual emissions based on projected decreases in forced outages and curtailments attributable to break down of the component being replaced." The upshot of EPA's interpretation is that existing units are precluded from replacing old, broken, worn-out, or flawed components, or otherwise conducting basic maintenance at their facilities, unless the utilities agree to be regulated as new sources. This new interpretation would appear also to preclude new advancements in replacement components that allow units to produce power more efficiently and, therefore, more cleanly.

In essence, EPA argues that performing the basic maintenance activities that all generating units must perform to reach the end of their useful lives transforms an "old" power plant into a "new" one. It is akin to telling a car owner that he may not change the oil in his vehicle, change its tires, or replace the battery without treating the car as a brand new vehicle, because these changes would allow the car to run longer (and, by EPA's logic, "increase emissions"). Certainly Congress did not intend for NSR to apply to electric utilities the first time they respond to an unexpected outage or perform scheduled maintenance — to interpret the rule in this manner would run contrary to Congressional intent to exclude older units.

EPA's preamble to its July 21, 1992 NSR final rule provides that, "The determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category" (57 F.R. 32314, 32327, July 21, 1992). Thus, determining whether an equipment replacement is routine depends not on whether the affected plant has replaced the part many times in the past, but rather on whether other sources within the same industrial category have replaced the part at one point or another. I understand that, within the utility industry, certain common types of repair that most plants undertake at one point or another may occur only once or twice during a plant's operating lifetime. The infrequency with which such repairs are undertaken at each plant does not change the accepted nature of such repairs as "normal" maintenance practice within the industry. It is this widespread acceptance of a maintenance practice that makes it "routine," not an individual plant's operating experience to date. EPA ignores industry custom and its own regulatory pronouncements by basing its enforcement initiative solely on the frequency with which a repair or replacement takes place at a particular plant.

In its response to Q6 of my February 28, 2000 letter, EPA denies that its new treatment of the modification rule limits the life span of an older power plant to the life span of the component with the shortest life. EPA explains that a unit may repair a broken component — including a major component — and continue operating, so long as it undergoes NSR. While it is certainly true, as EPA notes, that a properly maintained generating facility can expect a useful life of 60 years or more, EPA's response misses the point. Forcing older facilities to undergo NSR each time they undertake a basic repair will discourage the continued use of these facilities — resulting in a "regulatory death" long before the end of their mechanical lives. This is a point

Congress considered carefully in deciding to spare older units from NSR retrofits and permits, so long as these units do not make fundamental changes in the size or design of the facility that increase the maximum rate at which their facilities can emit pollutants. The repairs needed to achieve a utility's expected life span hardly fall into this category.

EPA's March 31st response suggests that Congress contemplated a 30-year useful life for coal-fired plants when passing the CAA because contemporaneous engineering texts "indicated that the useful life of coal fired utility boilers was approximately 30 years." In fact, TVA notes that "in the 1950s and 1960s, unit age at the date of retirement ranged from just less 30 to over 60 years" (TVA, Routine Maintenance of Electric Generating Stations, p. 7). I am not aware of any statute, regulation, or legislative history that suggests Congress relied on any particular life span for such units.

In response to Q5 of my February 28th letter, EPA claims there is no contradiction between its 30-year life span hypothesis and its assumption (in its Acid Rain analysis) that utilities would undertake refurbishment activities sufficient to reach operating life spans of 55 to 65 years. Specifically, EPA states:

> At the time of the 1990 Amendments, EPA did not know that the life extension programs that were underway would in fact increase emissions. Modifications that do not increase emissions do not give rise to obligations under NSR. Thus, the fact that life extension activities were ongoing does not in and of itself establish a violation of the Clean Air Act.

EPA's 1990 Acid Rain analysis, however, anticipated that heat rates (plant efficiency) would improve and that utilization would increase at units that undertook activities to achieve a 55 to 65 year average life span. Thus, in 1990, EPA understood that such units may increase utilization, and yet did not conclude then that they would trigger NSR.

Until it filed its lawsuits, EPA's statements indicated as recently as 1997 that maintenance, repair, and replacement commonly undertaken by utilities were not expected to trigger NSR. For example, in the preamble to a 1997 NSPS rulemaking, EPA confirmed that "[f]ew, if any changes typically made to existing steam generating units" would be deemed to trigger the modification rule (62 F.R. 36948, 36957, July 21, 1997). Similarly, in a 1996 letter to Senator Byrd, EPA stated that "it is anticipated that no existing utility unit will become subject to the [New Source Performance Standard (NSPS)] revision due to being modified or reconstructed." I find unconvincing EPA's March 31, 2000 attempt to distinguish this letter as applying only to NSPS as opposed to NSR regulations, given that EPA's NSPS regulations contain an exclusion for routine maintenance, repair, and replacement activities essentially similar to that found in the NSR regulations (40 C.F.R. § 60.14(e)(1); *cf.* 40 C.F.R. § 52.21(b)(2)(iii)(a)).

EPA claims that its enforcement actions are consistent with the Seventh Circuit's decision in *Wisconsin Electric Power Co. v. Reilly* (*WEPCo*), in which the court found that a utility's proposal for "massive" and "unprecedented" modifications was not routine (*WEPCo*, 893 F.2d 901, 911, 7th Cir. 1990). However, the *WEPCo* case is easily distinguishable from the

facts in EPA's current lawsuits. EPA determined that the comprehensive "life extension" project proposed by WEPCo was not routine because: (i) the project involved the replacement of "numerous major components;" (ii) the purpose of the project was to extend the life of the facility beyond its originally planned retirement date as an alternative to building new capacity; (iii) the units had been formally derated and operated in that condition, or had been shut down, for four years; (iv) the work was "highly unusual, if not unprecedented" rather than "regular" and "customary;" (v) the work involved four years of successive nine-month outages; and (vi) the project was extremely costly, estimated at $87.5 million or about 15 percent of the cost of a new facility (Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Director, Air Radiation Division, Region V, EPA, Sept. 9, 1988, pp. 2-6).

The *WEPCo* court agreed that the high cost (over $70 million) of WEPCo's proposal suggested that the project was not routine (*WEPCo*, 893 F.2d at 912). I understand that the projected costs in *WEPCo* were in the order of $250 per kilowatt, while the costs of the projects in the current lawsuits are, as a general rule, less than $30 per kilowatt — and some are as low as $1 per kilowatt. Likewise, I understand that each of the projects EPA has targeted has ample precedent in the utility industry, with a history of similar replacement at other facilities. None features the "one-of-a-kind" replacement that characterizes the *WEPCo* proposal. Finally, in WEPCo EPA made a prospective determination that a proposed change would be non-routine, rather than seeking to apply a new interpretation of the modification rule to units 25 years or more after the changes at issue were made.

While EPA now professes a lack of prior knowledge of boiler maintenance, repair, and replacement projects, EPA's consultant, the Radian Corporation, undertook a boiler life extension survey in 1986 and reported to EPA that "common repair/replacement jobs include: retubing, replacing waterwalls, air heater, duct work, or casing, and updating burners or controls" — some of the very types of projects now targeted in EPA's enforcement actions. Moreover, EPA's current approach to the modification rule is squarely at odds with the EPA's 1990 statements to the General Accounting Office (GAO) that the *WEPCo* decision had little bearing on other utility life-extension projects in the public eye at that time. In particular, GAO reported that "[a]ccording to EPA policy officials, WEPCo's life extension project is not typical of the majority of utilities' life extension projects, and concerns that the agency will broadly apply the ruling it applied in WEPCo are unfounded" (GAO/RCED-90-200, Electricity Supply: Older Plants' Impact on Reliability and Air Quality, pp. 30-31, 1990). Ironically, EPA's recent decision to target 32 of the largest units in the electric utility industry, which I understand represent over 28,000 megawatts of capacity, for violating the modification rule by replacing essentially similar types of equipment, indicates that the targeted maintenance practices do in fact represent "routine" repairs and replacement in that industry.

I agree with EPA's statement in its April 14, 2000 letter that a "complete response to the information requested could possibly compromise the Unites States' current litigation," but not only because answering might disclose proprietary information. In addition, EPA's calculation methodologies appear to be seriously flawed. Specifically, EPA's methodologies appear flawed because they compare emissions before and after modification without taking into account any potential emissions increase resulting from growth in power demand and other independent factors, which are supposed to be excluded under EPA's own rules (40 C.F.R. § 52.21(b)(33)).

EPA's methodologies also appear flawed because they punish utilities for maintaining their units at safe levels of availability and reliability, rather than targeting "new" pollution beyond a facility's original design capacity, as Congress intended. For example, EPA's April 14th letter states: "We have largely based our calculations on the assertions, found in internal company documents, that the changes [e.g., replacement of a worn component that was causing an outage] will 'result in' the stated reductions in forced outages."

EPA attempts to justify its lawsuits by claiming, "We believe, and hope you agree ... that some level of inquiry into the matter is appropriate." I agree that some level of inquiry may be appropriate. However, EPA could surely have pursued an inquiry by less coercive means than filing lawsuits alleging illegal conduct, particularly when EPA was engaged in negotiations with the utilities on how to reform the NSR program. EPA's March 31st letter attaches an enforcement alert to support the assertion that "our enforcement focus was made known to the affected industries several years ago." I fail to see how this enforcement alert does so for electric utilities, because it is from the same year (1999) as EPA filed its lawsuits.

I appreciate EPA's statement that EPA's lawsuits are not based on an ideological animus against coal. However, footnote 2 of EPA's March 31st letter may reflect a myopic under-appreciation of coal's importance to the U.S. economy. The footnote observes that "electricity costs only 2.5 percent of the GNP," the apparent implication being that coal-based electricity is of minor importance in the larger economic scheme of things. By this logic, the Department of Agriculture should feel free to regulate farmers out of existence, given that the agriculture sector produces only 1.7 percent of gross domestic product. Electricity, like agriculture, is foundational — everything else in the economy depends on it. Therefore, policies that jeopardize the affordability and reliability of electricity supply may damage a great deal more than the sector immediately affected.

EPA's rule change puts many utilities in a Catch-22. Under State law, many utilities are required to provide reliable and abundant electrical service at low cost. Reliable electrical service requires routine maintenance, repair, and replacement. However, if utilities continue to undertake what they commonly understand to be routine maintenance, repair, and replacement, they place themselves in danger of further enforcement action by EPA.

EPA's enforcement actions raise important policy questions of a type that are best addressed through prospective rulemaking. I therefore continue to be surprised that EPA would bring these enforcement actions in an attempt to regulate conduct that occurred as long as 25 years ago, instead of addressing for the future through rulemaking the conduct that EPA would like to regulate. Rather than securing meaningful environmental reform, EPA's actions have so far created only confusion, great cost for government and industry, and a disruption of normal maintenance activities at electric generating units. In contrast, a prospective rulemaking on these issues would provide industry and the public with notice of the EPA's proposed reforms, and a fair opportunity for these stakeholders to voice some very valid concerns about the policy direction EPA is now pursuing. It is for this reason that the Administrative Procedure Act and the CAA require EPA to pursue rule changes like the ones at issue here by prospective rulemaking. The comments of affected stakeholders would play an important role in ensuring that any EPA action on these issues will result in the most effective and fair standard possible.

I have additional questions about EPA's responses to my February 28th letter. I request that you respond to the attached questions by Friday, May 26, 2000. Please use the attached "Definitions and Instructions for the Production of Records." Please deliver your response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Subcommittee Counsel Bill Waller at 225-4407. Thank you for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Attachments

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

Questions on EPA Enforcement Against Electric Utilities

Q1. In its 1990 Report, entitled Electricity Supply: Older Plants' Impact on Reliability and Air Quality, the General Accounting Office (GAO) reported that:

> According to EPA policy officials, WEPCo's life extension project is not typical of the majority of utilities' life extension projects, and concerns that the agency will broadly apply the ruling it applied in WEPCo are unfounded. The officials noted that many life extension projects do not result in increased emissions, while other activities are routine in nature and thus exempt from the modification rule (GAO/RCED-90-200, pp. 30-31).

Please provide copies of any records that the Environmental Protection Agency (EPA) generated, or submitted to GAO, in connection with GAO's preparation of this report, including letters or other statements from EPA officials. In particular, please provide copies of any records that underlay or support the statement by "EPA policy officials" that GAO reports above.

Q2. EPA appears to take the position that the repair and replacement activities that allow a unit to be operated for longer than it would without the repair or replacement necessarily result in increased emissions and, thus, trigger New Source Review (NSR) requirements. Under EPA's new interpretation of the modification rule, wouldn't **all** projects to repair or replace equipment that caused a forced outage trigger NSR requirements? Wouldn't all projects to extend unit life trigger NSR requirements? If so, how does EPA reconcile its new interpretation of the modification rule with EPA's previous statements that most life-extension projects do not trigger the modification rule? If not, please provide specific examples of the types of life-extension projects that would **not** trigger NSR requirements under EPA's understanding of the modification rule.

Q3. In its response to Q1 of my February 28, 2000 letter, EPA states that: "Through several administrations, when asked, EPA has consistently maintained the position that the types of activities identified in these documents [the Complaints and Notices of Violation] are not routine." Please identify and provide copies of all statements and records in which EPA has asserted the position that projects similar to those targeted in the Complaints and Notices of Violation were not routine. For each such statement or record, please provide the name and title of the EPA official making the statement of record, the date of the statement or record, and identify the date, title, and author of any statement or record, if any, to which EPA was responding. Please also provide copies of any supporting documentation.

Q4. Please provide copies of records or documents produced by EPA, its agents, or consultants since 1971 discussing the types of projects identified in the Complaints and Notices of Violation and their status under the Clean Air Act.

Definitions and Instructions for the Production of Records

1. When a request calls for the production of records, the Subcommittee requests all responsive records that are in the agency's possession, custody, or control through the date of the final submission of records to the Subcommittee, unless the request clearly states that the Subcommittee is only interested in records received during a particular time period.

2. Please sequentially number all records that you produce to the Subcommittee, and indicate the source of any record if the source is not accurately reflected on the record itself. Please submit all records on single-sided paper and submit an inventory of records produced if the volume is more than 100 pages.

3. To the extent practicable, please organize the records or documents in tabbed binders or folders that indicate which records are responsive to which requests for information.

4. For the purposes of this and related requests in the future, the "record" or "records" shall include any and all drafts, originals, and non-identical copies of any item whether written, typed, printed, electronically recorded, transcribed, punched, or taped, however produced or reproduced, and includes but is not limited to any writing, transcription, or recording, produced or stored in any fashion, including any and all computer entries, memoranda, notes, talking points, letters, journal entries, reports, studies, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, e-mail messages (in hard copy and electronic forms), disks, the text of any alphanumeric messages or other electronic paging devices, briefing materials, cover sheets or routing cover sheets and any other machine readable material of any sort whether prepared by current or former officers and employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include redacted and unredacted versions of the same record.